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In The

Supreme Court of the United States

JOSEPH JAMES STRATTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE PETITION

In its brief in opposition, the government argues that Stratton's grounds one and two (challenging *Booker*'s remedial decision as applied and challenging the standard of proof required in *Booker* sentencing fact finding) be denied, but that as to ground three (crack versus powder disparity) the petition be held for disposition in accordance with the disposition of *Kimbrough v. United States*, No. 06-6330.

We respectfully disagree as to grounds one and two. In light of *Rita v. United States*, 127 S.Ct. 2456 (2007), which was cited by the Government's brief in opposition, but which issued after Stratton's petition was filed, the arguments for granting certiorari on grounds one and two are all the more compelling.

The concerns presented by Justice Scalia's special concurrence, joined by Justice Thomas, as well as Justice Souter, and acknowledged by Justices Stevens and Ginsburg in *Rita* regarding the hypothetical case presented by Justice Scalia are presented in fact by Stratton's case. Justice Stevens wrote that "Such a hypothetical case should be decided if and when it arises." *Rita*, 127 S.Ct. 2456, 2473 (2007).

As Justice Scalia wrote: "The Court has reintroduced [in the *Rita* appellate review presumption of reasonableness of guideline sentences] the constitutional defect that *Booker* purported to eliminate." *Rita*, 127 S.Ct. 2456, 2476 (2007). Justice Scalia later elaborated: "The only difference between this system [the *Rita* appellate review standard] and the pre-*Booker*

mandatory Guidelines is that the maximum sentence based on the jury verdict or guilty plea was specified under the latter but must be established by appellate courts, in case by case fashion, under the former. *This is, if anything, an additional constitutional disease, not a constitutional cure.*" *Rita*, 127 S.Ct. 2456, 2477 (2007) (emphasis supplied).

Pertinent to Stratton's argument in ground one of his petition, Justice Scalia wrote:

> Yet they [the majority] now adopt substantive reasonableness review without offering any rebuttal to my charge of patent constitutional flaw inherent in such review. *The one comfort to be found in the Court's opinion – though it does not excuse the failure to apply* Martinez's *interpretive principle – is that it does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea.*

Rita, 127 S.Ct. 2456, 2479 (2007).

Stratton's argument all along has been that his case presents a *de facto*, or as applied, Sixth Amendment violation. The *de facto* violation of the Sixth Amendment first occurred at Stratton's resentencing when the district court reneged on its own admission at the first, *pre-Booker*[1] sentencing that the guideline

[1] *United States v. Booker*, 534 U.S. 220 (2005).

sentence was too severe, but when given an opportunity on remand under *Booker* to reduce the sentence, continued to slavishly apply the too severe guideline, despite lip service to the bromide of *Booker*'s remedial opinion that the guidelines were now advisory.[2] The Government in its brief in opposition blithely dismisses the statistical data that shows that this case is no fluke, instead it is typical and represents a pattern of *post-Booker* Constitutional violation, that were it presented in any other context would be sufficiently clear to warrant relief.

As Justice Scalia wrote in footnote 4 of his special concurrence:

> [T]he Court is wrong to think that the constitutional problem today's opinion ignores is hypothetical, merely because I have used hypotheticals to describe it. It is all too real that advisory Guidelines sentences routinely change months and years of imprisonment to decades and centuries on the basis of judge-found facts – as *Booker* itself recognized, see 543 U.S. at 236-237, 125 S.Ct. 738 (citing *inter alia*, a case in which a defendant's sentence increased from 57 months to 155 years).

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[2] The Court did apply a two level safety valve reduction that had not applied at the first sentencing, but this barely mitigated the excessive severity of the guideline range, a range magically determined by a conversion of powder cocaine quantities to crack cocaine offense levels. It was an *Alice in Wonderland* approach.

Mr. Stratton was convicted of conspiracy to distribute 500 grams or more of cocaine and five grams or more of cocaine base. The Presentence Report ("PSR") charged that Mr. Stratton was responsible for at least 1.5 kilograms of cocaine base, which would give Mr. Stratton a base offense level of 38. U.S.S.G § 2D1.1(c)(1). Over Mr. Stratton's objection both to the quantity of powder cocaine and to the finding that he was accountable for down-stream conversion of the powder cocaine to crack cocaine, the District Court accepted the PSR's drug quantity determination. After applying a two-level upward adjustment for obstruction of justice, the District Court determined that Mr. Stratton's adjusted offense level was 40. Since Mr. Stratton did not have a criminal history, his guideline range was 292-365 months. *If the District Court had not engaged in extra-verdict fact finding to support Guideline enhancements, Mr. Stratton's guideline range would have been 63-78 months.*

At resentencing after the *Booker* remand,[3] the district court made the very same determinations

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[3] In Stratton's first appeal the Eleventh Circuit granted Stratton a *Booker* remand finding that the district court had committed plain error in violating Mr. Stratton's Sixth Amendment rights by making these sentencing determinations:

> Because the District Court enhanced Ms. Thompson's sentence under a mandatory guideline system on the basis of factual findings not made by a jury or admitted by Ms. Thompson, Ms. Thompson's Sixth Amendment rights were violated. *Rodriguez*, 398 F.3d at

(Continued on following page)

with the only difference being that the district court granted Stratton a safety valve two level downward adjustment, reducing the offense level to 38 and the sentencing range to 235-293 months and imposed a 235 month sentence. Without the extra-verdict enhancements after the safety valve reduction his sentencing range would have been 51-63 months. The sentence supported by the jury verdict – fifty-one months – was increased by judicial fact finding to almost 20 years in prison.

Now under *Rita* this determination has been cemented into place by a standard of review that compounds the constitutional error. The same factors that created the constitutional error – judicial fact finding which has multiplied a punishment almost five-fold – are now used under *Rita* to uphold the reasonableness of that same sentence. This is circular reasoning, and as Justice Scalia noted, it compounds instead of cures, the constitutional violation.

The concurring Justices in *Rita* were at pains to emphasize that *Booker*'s remedial opinion is settled precedent. Stratton does not agree that surviving one term settles precedent. Instead, the tsunami of post-*Booker* appellate litigation and the statistics gathered by the Sentencing Commission showing that the

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1298. . . . For the same reasons we discussed with regard to Ms. Thompson's sentence, Mr. Stratton's sentence violated his Sixth Amendment rights, and the error was plain.

actual effect of the decision has been that the Guidelines are adhered to more strictly than before, suggests that *Booker*'s remedial opinion should be revisited.

At least as applied in this case Stratton's Sixth Amendment rights were violated by a *de facto* mandatory application of the Guidelines and by an appellate review, which as applied in Stratton's case, resulted in a further constitutional violation because that review and the decision to uphold his sentence as reasonable was based on an unreasonable reliance upon the very same unconstitutional sentencing factors that he complained of in the first place.[4]

The government also argues that Stratton's petition should be held pending the decision in *Kimbrough*. Subject to our arguments above, we agree as to *Kimbrough*. We only note that Stratton's case, because Stratton was held accountable for a down-stream powder-to-crack conversion, and because Stratton was a first offender, presents a more appropriate vehicle to examine the crack-powder disparity issue than does *Kimbrough*. We would ask the Court to consider consolidating Stratton's petition with *Kimbrough*.

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[4] In *Rita*, Justice Scalia favorably noted the decision of the District Court in *United States v. Nadine Griffin*, 393 F.Supp. 2d 1 (D. Mass. 2007). *Nadine Griffin* is further support for Stratton's position, and Stratton requests this Court to consider Judge Young's opinion in support of his petition.

CONCLUSION

Based on the reasoning and citations of authority set forth above and in Mr. Stratton's petition for writ of certiorari, Mr. Stratton requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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